



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 30, 1998

Ms. Helen K. Bright  
The University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2981

OR98-0289

Dear Ms. Bright:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112315.

The University of Texas Southwestern Medical Center at Dallas (the "medical center") received a request for "copies of all exams and answers for the exam given in Cardiopulmonary Management and Evaluation given on October 13, 1997," as well as for "copies of all abstracts of articles filed by other students in the Physical Agents II course during the 1997 summer semester." You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.114, and 552.122 of the Government Code. You have submitted a representative sample of the requested information for our review.<sup>1</sup>

Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this instance, you explain that the commission is currently involved in pending litigation, *Margulis v. University of Texas Southwestern Medical Center of Dallas*, No. 97-07696 (193rd Judicial District Court, Dallas County, Texas). You have provided this office with a copy of the petition in that case. After reviewing the submitted materials, we conclude that litigation is pending and that the requested information relates to the litigation. The medical center may, therefore, withhold the requested information.<sup>2</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>3</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

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<sup>2</sup>We observe, however, that one of the submitted documents appears to be the requestor's own education record. The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, provides that federal funding shall not be made available "to any educational agency or institution which has a policy of denying, or which effectively prevents" a minor student's parents from inspecting and reviewing the education records of their children. *Id.* § 1232g(a)(1)(A). A student who is 18 years of age or older or attends a postsecondary educational institution has the same right of access to his or her own education records. *Id.* § 1232g(d). None of the exceptions which you have raised provide an exception from the FERPA mandatory access provisions. Open Records Act exceptions generally do not protect information made public by other statutes. See Open Records Decision No. 623 (1994).

<sup>3</sup>As we resolve this matter under section 552.103, we need not further address the other exceptions you have raised. We caution, however, that some of the information may be confidential by law. Therefore, if the medical center receives a request in the future, at a time when litigation is no longer pending, the medical center should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/glg

Ref.: ID# 112315

Enclosures: Submitted documents

cc: Mr. John J. Pfister, Jr.  
Weiner, Glass & Reed  
8300 Douglas Avenue, Suite 730  
Dallas, Texas 75225  
(w/o enclosures)